

REMARKS

Applicant respectfully requests that the Examiner withdraw the finality of the Office action mailed 10/20/2009 and issue a new, non-final Office action because the finality of the Office action mailed 10/20/2009 is premature.

MPEP § 706.07(a) states as follows:

Under present practice, second or any subsequent actions on the merits shall be final, except where the examiner introduces a new ground of rejection that is neither necessitated by applicant's amendment of the claims, nor based on information submitted in an information disclosure statement filed during the period set forth in 37 CFR 1.97(c) with the fee set forth in 37 CFR 1.17(p). Where information is submitted in an information disclosure statement during the period set forth in 37 CFR 1.97(c) with a fee, the examiner may use the information submitted, e.g., a printed publication or evidence of public use, and make the next Office action final whether or not the claims have been amended, provided that no other new ground of rejection which was not necessitated by amendment to the claims is introduced by the examiner.

The Office action mailed 10/20/2009 included the following new grounds of rejection that were neither necessitated by the Applicant's amendment of the claims, nor based on information submitted by the Applicant in an information disclosure statement filed under 37 CFR 1.97(c) as provided in MPEP § 706.07(a):

- (1) the rejection of claims 5, 6, 8, 52, 55, 58-60, 63-66, 75, and 76 under 35 U.S.C. 102(b) as allegedly being anticipated by U.S. Pat. No. 7,467,749 to Seidel ("Seidel");
- (2) the rejection of claims 11 and 67-74 under 35 U.S.C. 103(a) as allegedly being unpatentable over Seidel;
- (3) the rejection of claims 11, 40-42, 47, 52, 55, 67-72, 75, and 76 under 35 U.S.C. 103(a) as allegedly being unpatentable U.S. Pat. No. 4,199,942 to Harding; and
- (4) the provisional rejection of claims 5-9, 11-18, 40-46 on the ground of nonstatutory obviousness-type double patenting as allegedly being unpatentable over claims 252-281, 311, 350, and 389 of co-pending application U.S.S.N. 10/480,582.

Although Seidel and Harding were included in an information disclosure statement filed during the period set forth in 37 CFR 1.97(c), that information disclosure statement was filed on 11/21/2006. MPEP § 706.07(a) provides that the examiner may use such information in making "the next Office action" final. The "next Office action"

following Applicant's 11/21/2006 information disclosure statement was mailed 06/12/2007. Accordingly, "the next Office action" in which the Seidel and Harding references were available to be used to make an Office Action final was the 06/12/2007 Office action, not the 10/20/2009 Office action.

Furthermore, the grounds for rejection in the non-final Office action of 12/27/2007 involving Harding were different from the new grounds for rejection based on Harding in the 10/20/2009 final Office action. The 12/27/2007 Harding rejections were based on a different statute [102(b)] or involved a different set of claims under 103(a).

Finally, the new double patenting rejection was not necessitated by Applicant's amendments, nor was it based on information submitted in an information disclosure statement filed during the period set forth in 37 CFR 1.97(c).

Accordingly, for each of the above reasons, Applicant respectfully requests that the Examiner reconsider and withdraw the finality of the current Office action.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Examiner reconsider the new grounds for rejection in the final Office action mailed 10/20/2009 and withdraw the finality and issue a new, non-final Office action. If the Examiner believes a telephonic interview would expedite prosecution of this Application, the Examiner is welcome to contact Applicant's representatives at the numbers below.

Respectfully submitted,

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